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Nos. 94-1397, 94-1422

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

No. 94-1397

RICHARD ARRINGTON, JR., et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents,

and

No. 94-1422

JOHN W. MARTIN, et al.,

v. *Petitioners,*

ROBERT K. WILKS, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MEMORANDUM IN SUPPORT OF PETITIONS

LaVeeda Morgan Battle
Counsel of Record

Mark T. Wagoner
Gorham & Waldrep, P.C.
2101 6th Avenue North,
Suite 700
Birmingham, AL 35203
(205) 254-3216

Counsel for Respondent Personnel Board of Jefferson County, Alabama

March 9, 1995

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QUESTIONS PRESENTED FOR REVIEW

This is a response to the Petitions for Writ of Certiorari submitted pursuant to Supreme Court Rule 12.4. Since Respondent supports the position of the Petitioners, it adopts the questions presented for review as stated by Petitioners.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs

James A. Bennett
Birmingham Association of City Employees
Charles E. Carlin
Ronnie J. Chambers
Floyd E. Click
Joel A. Day
Lane L. Denard
John E. Garvich, Jr.
James W. Henson
Gerald L. Johnson
Danny R. Laughlin
Robert B. Millsap
James D. Morgan
Gene E. Northington
Carlice E. Payne
Howard E. Pope
Vincent J. Vella
Kenneth O. Ware
Phillip H. Whitley
Marshall G. Whitson
Robert K. Wilks
David H. Woodall

Plaintiff-Intervenor

United States of America

Defendants

Richard Arrington, Jr.
Roderick Beddow, Jr.
City of Birmingham
Joseph W. Curtin
James W. Curtin
Patricia Hoban-Moore
Jefferson County Personnel Board
James B. Johnson
Henry P. Johnston
Hiram Y. McKinney

Defendant-Intervenors

John W. Martin
Sam Coar
Major Florence
Charles Howard
Ida McGruder
Eugene Thomas

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On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MEMORANDUM IN SUPPORT OF PETITIONS

Respondent, Personnel Board of Jefferson County, Alabama, ("Personnel Board"), submits this memorandum in support of the Petitions for Writ of Certiorari filed

by Richard Arrington, Jr., City of Birmingham (City), John W. Martin, et al., (Petitioners) and pursuant to Supreme Court Rule 12.4 submit this Response to the Petitions. Supreme Court Rule 12.4 states in pertinent part:

> " . . . [A]ny respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that a response to the petition shall be filed within twenty days after its receipt . . . ".

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit at issue is reported as *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, *reh'g denied* (slip op.), *reh'g en banc denied*, ___ F.3d ___, 1994 WL 97742 (11th Cir. 1994). The opinion of the District Court is reported in *Bennett v. Arrington*, 806 F. Supp. 926 (N.D. Ala. 1992).

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1994. The Court of Appeals denied Petitioners' and Personnel Board's Petitions for Rehearing on November 25, 1994. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The constitutional provisions, statutes, and regulations involved are: The Fourteenth Amendment to the Constitution of the United States and Section 703 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2. U.S. Constitutional Amendment XIV, Section 1, the Equal Protection Clause, provides in pertinent part that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

> (a) It shall be unlawful employment practice for an employer
>
> (1) to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ; or
>
> (2) to . . . classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .

42 U.S.C. § 2000e-2.

STATEMENT OF THE CASE

The Personnel Board adopts by reference the Statement of the Case submitted by the Petitioners. In

response to the petitions, the Personnel Board would supplement the statements of the case as follows.

This matter arose from the August 14, 1992, judgment of the trial court rejecting claims made by a group of male, non-black employees of the City of Birmingham alleging that the City, acting pursuant to a consent decree it entered in 1981 to resolve pending litigation, violated their rights under Title VII and the Equal Protection Clause. The plaintiffs alleged that promotion decisions made under the decrees were based solely upon the race of the person selected.

In the mid 1970's, four separate cases that brought actions against the City of Birmingham, the Personnel Board, Jefferson County, and other local government agencies alleging that their hiring and promotion practices were discriminatory against blacks and women, were consolidated. While the cases were pending, the parties undertook settlement negotiations. In June 1981, the plaintiffs entered into separate consent decrees with the City and the Personnel Board. On June 8, 1981, the District Court entered an order provisionally approving the consent decrees, pending public notice and an opportunity for public comment at a fairness hearing held August 3, 1981.

On July 14, 1981, non-black City employees filed a motion for leave to intervene in the proceeding and at the fairness hearing objected to the proposed decrees. The motion to intervene was denied as untimely by the District Court and the decrees were approved on August 18, 1981. Subsequently, other non-black male employees filed several suits claiming that the implementation of the

decrees constituted reverse discrimination, alleging they were passed over for promotions as a result of their implementation.

A trial of the consolidated reverse cases was held December 16-20, 1985. In that trial, the District Court granted the Personnel Board's motion for dismissal upon a finding that the plaintiff "[did] not establish . . . unlawful discrimination by the Board." (R21-1257).

The District Court further clarified its ruling at a status conference held on November 21, 1989. The Court reiterated the status of the Personnel Board as a nominal defendant present for the limited purposes of facilitating discovery of documentary evidence and cooperating in the implementation of any prospective injunctive relief which might be afforded to the plaintiffs. (R9-12-13).

The 1991 District Court proceeding and subsequent August 14, 1992, judgment from which these petitions emanate (*Bennett v. Arrington*, 806 F.Supp. 926 (N.D. Ala. 1992)) was a supplemental trial to the 1985 trial and the evidence submitted at the 1985 trial was still before the Court. (R12-13).

Accordingly, the individual plaintiffs and plaintiff-intervenors and the Personnel Board entered into a joint stipulation acknowledging the ruling by the District Court and accepting that determination as final and binding. The plaintiffs further waived any and all rights to challenge or appeal the ruling of November 21, 1989. The plaintiffs further agreed not to seek any monetary relief, including costs or attorney's fees from the Personnel Board in this action. The Personnel Board also agreed not

to seek any costs, attorney's fees or other relief from the plaintiffs. (R1-100).

Additionally, during the November 21, 1989, status conference, the District Court confirmed that the issue of testing and examination validity had been severed from consideration in this phase of the litigation. (R9-14). The time-table for achieving goals and testing validation is an issue in the companion "consent decree cases" (*Ensley Branch N.A.A.C.P. v. Siebels*, 31 F.3d 1548 (11th Cir. 1994)) but is not at issue here.

REASONS FOR GRANTING THE WRIT

Respondent adopts the reasons for granting the writ as stated by the Petitioners. The Respondent would supplement the reasons for granting the writ as stated by the Petitioners as follows.

I. The Eleventh Circuit erroneously concluded that the Personnel Board certifies separate lists of black and non-black eligible candidates.

In discussing the operation of the City decree, the Eleventh Circuit found that the Personnel Board certifies names on separate lists of black and non-black eligible candidates.

> "If the City indicates on the request for certification that blacks are needed to meet the requirements of the decree, the Board reviews the eligible register and provides the necessary number of names on separate lists of black and non-black eligible candidates. Black candidates

> and non-black candidates are listed separately in the order in which they are ranked on the eligible register."

In re Birmingham Reverse Discrimination Empl. Litig., 20 F.3d 1525, 1535 (11th Cir. 1994). This is an erroneous conclusion and is not supported in the record. The Personnel Board does not and has not provided lists of eligible candidates classified by race or any other classification. If it is obligated to supplement a list under its consent decree it provides one supplemented list of eligible candidates.

The Personnel Board Enabling Act (1945 Ala. Acts No. 248, as amended), governs the appointment of applicants to vacancies in the classified service. It specifies that after receiving a request for certification from an appointing authority, "[t]he Director shall thereupon certify to the appointing authority the names of the three ranking eligibles . . . when the vacancy for which the appointing authority has requested *a list* of eligibles . . . ." The Enabling Act speaks of *a* list, in the singular, for each request for certification.

Likewise, the Personnel Board Rules and Regulations address certification of eligible employees for vacancies in the classified service. Rule 4.5 governs compilation of a list of eligibles upon request by an appointing authority. In pertinent part it reads as follows:

> **"4.5 CERTIFICATION**
>
> Based on the receipt of an authorized requisition from an appointing authority, the Director shall certify and/or refer the name of eligibles from

the appropriate lists[1] in the following priority and manner:

(a) First, the one (1) name of the ranking former employee of the department for each vacancy from the layoff list, if any, shall be appointed.

(b) Second, the three (3) ranking names of former employees of other departments for each vacancy from the layoff list, if any, shall be used.

(c) Third, the three (3) ranking names of the employees of a department for a vacancy, if and only if they are the ranking eligible on the promotional list from the department in which the requisition originated, shall be used.

(d) Fourth, for each vacancy the three (3) ranking names of employees from other departments on the promotional list, if any, shall be used.

(e) Fifth, for each vacancy the three (3) ranking names of eligibles from the open competitive list, if any, shall be used.

(f) In general all entry level positions to be filled from open competitive lists shall be filled by the rule of three (3), with one additional name for each vacancy past the first vacancy. In the event that *a* requested

---

[1] The plural "lists" here should not be confused with the list of candidates certified to an appointing authority upon request for certification. Here, "lists" refers to eligible registers from which the list of qualified candidates is certified to the appointing authority.

> *list* of eligible[s] is for a department head position, the Director shall certify to the appointing authority the names of six (6) eligibles unless the appointing authority shall request only the names of the three (3) ranking eligibles. If the requested *list* of eligible[s] is for the entry level position of police officer, deputy sheriff, or firefighter, then the appointing authority may elect to request the certification of the names of five (5) different eligibles for each vacancy. If the appointing authority elects to request the certification of the names of five (5) different eligibles, he shall notify the Board of such election in writing by the same methodology used to request the certification of eligibles for other vacancies as set out in these rules.
>
> (g) . . . " (emphasis added)

Thus, there is no provision in the Personnel Board Enabling Act or certification rule authorizing multiple certification lists.

Furthermore, the Personnel Board consent decree established no requirements for certification on separate lists of black and non-black eligible candidates. The decree sets annual goals of certifying black and female applicants to each of the jurisdictions served by the Board, subject to the availability of black and female applicants. (85-PX-5, Section IV). The decree also establishes as a means of ensuring that sufficient numbers of blacks and women are certified to meet the decrees' goals that "the Personnel Board may certify at least three eligibles for any job vacancy in the classified service and, where necessary to meet such goals, may expand further

the number of eligibles certified for a particular job vacancy." (85-PX-5, ¶ 34). The consent decree itself establishes no practice or procedure of providing separate lists of black and non-black eligible candidates for certifications for job vacancies. It allows for *supplementation* of eligible candidates to attempt to achieve the decrees' goals.

The erroneous assumption made by the Eleventh Circuit would prove unworkable for all practical purposes. The Personnel Board develops one list for each vacancy. The separate list scenario assumes that there are no black eligibles in the top three to be certified. Needless to say, there are often black eligibles certified without supplementation.

The Eleventh Circuit cited paragraphs 17 and 27 of *In re Birmingham Reverse Discrimination Employment Litig.*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. 1985), *rev'd*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989), as the source of the information concerning separate lists of black and non-black eligible candidates. Nothing in those paragraphs mentions or refers to "separate lists." In fact, paragraph 27 indicates that the City receives "*a* certification of the names of individuals eligible for a promotion." (emphasis added). Paragraph 27 further states: "[s]ince the entry of the City decree, when the City indicates on its request for certification that its promotional goals have not been met, the Board certifies ranking individuals pursuant to the rule of three, *plus* the names of a sufficient number of black individuals to enable the City to meet its City decree goals." *Id.* at 1437-38, 27 (emphasis added). There is no reference to separate lists but only to the *supplementation*

of a sufficient number of black individuals to enable the City to meet its goals.

The consent decree acknowledges that the decision to employ persons certified by the Personnel Board is left to the sole discretion of the appointing authority of each jurisdiction. (85-PX-5, ¶ 23). For this reason, the Personnel Board supplements its certification lists with sufficient names of black eligible candidates to enable the City to meet its goals under the decree.

CONCLUSION

For the reasons stated by the Petitioners and supplemented herein, this Respondent respectfully supports the Petitioners' requests to this Court to grant *certiorari* to review the decision of the Eleventh Circuit.

March 9, 1995

Respectfully submitted,

LaVeeda Morgan Battle
Counsel of Record

Mark T. Waggoner
Gorham & Waldrep, P.C.
2101 6th Avenue North,
Suite 700
Birmingham, AL 35203

Counsel for Respondent
Personnel Board of
Jefferson County, Alabama